(5)

APR 6 - 2005

No. 04-1055

IN THE

# Supreme Court of the United States

SAFE AIR FOR EVERYONE,

*Petitioner*,

*v.*

WAYNE MEYER, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## OBJECTION TO PETITIONER'S QUESTION PRESENTED

Pursuant to the provisions of Rule 15.2, the Growers object to Petitioner's characterization of the question presented in this matter. The Ninth Circuit held that Petitioner "has not demonstrated a genuine issue of material fact on the issue whether grass residue was 'discarded' within the meaning of the Resource Conversation and Recovery Act, ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and was therefore a 'solid waste' under the statute." Pet. at A18. Petitioner's question presented contains two underlying assumptions that do not accurately reflect the record below. First, neither the District Court nor the Ninth Circuit found that Kentucky bluegrass straw and stubble were "secondary material." Second, both the District Court and the Ninth Circuit found that Petitioner presented no evidence to contradict that the Growers' use of their straw and stubble as part of "a continuous farming process effectively designed to produce Kentucky bluegrass." Pet. at A15.

The proper question presented is whether the Ninth Circuit erred in finding that, based upon the undisputed evidence, there was no genuine issue of material fact that the Growers do not "discard" their Kentucky bluegrass straw and stubble, and therefore their use of this material is not governed by RCRA.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OBJECTION TO PETITIONER'S QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF CITED AUTHORITIES | iv |
| COUNTERSTATEMENT OF THE CASE | 1 |
| THE COURSE OF THE LOWER COURT PROCEEDINGS | 2 |
| 1. Factual Background | 2 |
| 2. The District Court Dismisses the Complaint | 7 |
| REASONS FOR DENYING THE PETITION | 10 |
| I. The Ninth Circuit's Opinion Is Based Upon and Is Entirely Consistent With RCRA's Statutory Definition of "Solid Waste" | 11 |
| II. The Ninth Circuit's Opinion Is Consistent With The RCRA Jurisprudence of Other Circuit Courts of Appeal and Creates No Conflict Between the Circuits | 17 |
| III. The Ninth Circuit's Opinion Has Created No Loophole in Enforcement of RCRA's Hazardous Waste Regulations. | 24 |

*Contents*

*Page*

A. EPA's Hazardous Waste Regulatory Definition of Solid Waste Is Inapplicable to This Matter Because Neither Stubble Nor Straw Is Hazardous. ..... 24

B. The Ninth Circuit's Opinion Creates No Loophole In Regulating Hazardous Wastes. ..... 28

CONCLUSION ..... 30

## TABLE OF CITED AUTHORITIES

*Page*

Cases:

*3550 Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355 (9th Cir. 1990) ..... 12

*A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107 (9th Cir. 1998) ..... 12

*American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) ..... *passim*

*American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ..... 5, 14, 18, 20

*American Petroleum Institute v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) ..... 4-5, 23

*Association of Battery Recyclers, Inc., v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) ..... 5, 12, 18, 19, 23

*Bradley v. Austin*, 841 F.2d 1288 (6th Cir. 1988) ... 26

*Butler v. City of Prairie Village, Kansas*, 172 F.3d 736 (10th Cir. 1999) ..... 13

*CBS v. FCC*, 453 U.S. 367 (1981) ..... 9

*Connecticut Coastal Fishermen's Assn. v. Remington Arms Co., Inc. et al.*, 989 F.2d 1305 (2d Cir. 1993) ..... 18, 22

*Gallenstein v. United States*, 975 F.2d 286 (6th Cir. 1992) ..... 26

*Cited Authorities*

*Page*

*Interfaith Community Org. v. Honeywell, Int'l, Inc.*, 399 F.3d 248 (3d Cir. 2005) ..... 5

*No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148 (2d Cir. 2001) ..... 23

*Owen Electric Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994) ..... 22, 23

*Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) .... 9

*Richards v. United States*, 369 U.S. 1 (1962) ..... 9

*Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003) ..... 19, 23

*Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137 (1984) ..... 9

*United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993) ..... 18, 20, 21, 22

*U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd*, 55 F.3d 1276 (7th Cir. 1995) ..... 12

*Cited Authorities*


| | Page |
|---|---|
| **Statutes:** | |
| Resource Conversation and Recovery Act | |
| 42 U.S.C. § 6901 *et seq.* | i |
| 42 U.S.C. § 6902(a) | 4 |
| 42 U.S.C. § 6903(27) | 4, 12 |
| 42 U.S.C. § 6972 | 5 |
| 42 U.S.C. § 7400 *et seq.* | 3 |
| 42 U.S.C. § 7404(a) | 3 |
| 42 U.S.C. § 9601(29) | 12 |
| National Ambient Air Quality Standard for Particulate Matter | |
| 40 C.F.R. Part 50 | 3 |
| 40 C.F.R. § 261 | 24 |
| 40 C.F.R. § 261.2 | 21 |
| 40 C.F.R. § 261.1(b)(1) | 25 |
| 40 C.F.R. § 261.2(c) | 27 |
| 40 C.F.R. § 261.2(e)(i) | 27 |
| Idaho Code § 22 – 4801 *et seq.* | 6, 27 |
| Idaho Code § 39 – 2305(2)(a) | 3 |
| Idaho Code § 39 – 2305(2)(b) | 3 |
| **Other Authorities:** | |
| The Shorter New Oxford English Dictionary 684 (4th ed. 1993) | 12 |
| H.R. Rep. No 94-1491 (1976), reprinted in 1976 U.S.C.C.A.N. 6238 | 4, 13 |

## COUNTERSTATEMENT OF THE CASE

This Petition for a Writ of Certiorari stems from the dismissal of a citizen's suit brought in the District of Idaho arising under the RCRA. Petitioner challenged the age-old practice of agricultural burning conducted by Respondents, growers of Kentucky Bluegrass in Kootenai and Benewah counties of the panhandle of northern Idaho ("Growers"). The Growers conduct agricultural burning under the strict supervision and control of the State of Idaho and pursuant to a permit granted by the State of Idaho. Petitioner asserts that the Growers' burning activities constitute a violation of RCRA and an imminent and substantial endangerment to public health and the environment, despite operating, at all times, under a carefully state regulated burning program under the auspices of the federal Clean Air Act.

Following a lengthy evidentiary hearing on the Petitioner's Motion for a Preliminary Injunction and the Growers' Motion to Dismiss, the District Court found that the Growers used their stubble and straw as part of the growth process and did not abandon or discard it. Pet. at A39. The District Court dismissed Petitioner's complaint, holding that the Growers' bluegrass straw and stubble was not a "solid waste" and therefore RCRA did not apply. *Id.*

The Ninth Circuit affirmed the dismissal, holding that the Growers' Kentucky bluegrass stubble and straw were not solid wastes, the core prerequisite for any RCRA action. The Ninth Circuit, which reviewed the District Court's dismissal *de novo*, found that the undisputed evidence established that the Growers used the stubble and straw as part of a continuous process of growing bluegrass and did not discard or abandon it. After the Ninth Circuit issued its opinion, Petitioner moved for reconsideration and for an *en banc* hearing. Petitioner's motion was denied without receiving a single vote in favor of further consideration.

The Petition asserts that the issuance of a Writ of Certiorari is appropriate in light of the Ninth Circuit's alleged misconstruction of the definition of "solid waste," the existence of an alleged circuit conflict and the creation of a "broad loophole" which purports to seriously erode RCRA's effectiveness. None of Petitioner's contentions have merit. The Ninth Circuit's opinion was correctly premised upon its application of the unambiguous meaning of the term "solid waste" to the facts presented, in accordance with Congress' clear definition of that term. No circuit split exists and the Ninth Circuit's opinion is entirely consistent with the opinions of all other circuits, including those issued by the D.C., Second, Fourth and Eleventh Circuits. Finally, Petitioner's claim that the Ninth Circuit's opinion creates a broad loophole in RCRA's effectiveness is unsupportable. Accordingly, the Growers respectfully submit that the Petition be denied.

## THE COURSE OF THE LOWER COURT PROCEEDINGS

### 1. Factual Background

For decades, growers of Kentucky bluegrass in north Idaho have conducted agricultural field burning of Kentucky bluegrass straw and stubble as part of their normal farming operations. The Growers farm on portions of the Coeur d'Alene Indian Reservation and on the Rathdrum Prairie in Kootenai and Benewah Counties, in the northern panhandle of Idaho. At the time of the filing of this action, approximately 30,000 acres were utilized for bluegrass seed production on the Coeur d'Alene Indian Reservation and approximately 7,000 acres were utilized on the Rathdrum Prairie.[1]

In north Idaho, Kentucky Bluegrass is a turf grass grown primarily for the production of seeds for commercial

1. Substantially fewer acres of Kentucky bluegrass are currently in production in north Idaho than were grown at the time of the filing of Petitioner's complaint.

sale. The process for growing bluegrass in north Idaho involves an initial spring planting of seeds. The Growers actively monitor and assist the growth and flowering of the grass plant during the remainder of the first year and through the middle of the summer of the following year. After the grass has flowered during the second year, the stems are cut, leaving the cut grass seeds, stems, and stubble on the field in order to dry. The Growers use combines to harvest the grass seeds through a process of cutting, separating, and collecting the seeds for further cleaning and processing for sale to the consumer. The remaining post-harvest materials, which includes straw and stubble are used for plant regeneration and are burned *in situ. See* Pet. at A2.

The practice of agricultural burning in Idaho is regulated by the United States Environmental Protection Agency ("EPA") pursuant to the federal Clean Air Act ("CAA") (42 U.S.C. § 7400 *et seq.*) and by the National Ambient Air Quality Standard for Particulate Matter (40 C.F.R. Part 50). The State of Idaho enforces the CAA through its EPA-approved State Implementation Plan ("SIP"). State and local officials in Idaho are required to and do monitor atmospheric conditions prior to granting authorization to each Grower to burn each of their grass fields.[2] Pursuant to state laws, open burning in Kootenai and Benewah Counties is conducted only when "weather conditions are conducive to good smoke dissipation . . . and [if] the burning does not violate current state and federal air quality standards." Idaho Code § 39-2305(2)(a). Stubble and straw can only be burned on the field where it was grown. Idaho Code § 39-2305(2)(b).

Agricultural burning is essential to producing consistent and maximum yields of a healthy seed crop the following year.

2. Each State has primary responsibility for assuring air quality within the entire geographic region comprising such state. 42 U.S.C. § 7404(a). The Idaho Department of Environmental Quality ("IDEQ"), pursuant to a delegation of authority from EPA pursuant to the CAA, administers its own elaborate air-quality program pursuant to its SIP.

Burning stimulates the soil, recharges and provides nutrients for the grass plant's root system, assists in eliminating parasitic pests and destructive molds and fungus growth, and dramatically lengthens the lifespan of a bluegrass field to as much as twenty years.[3] The field burning process also substantially increases the yield of virtually all bluegrass seed varieties. If Kentucky bluegrass fields in north Idaho are not burned, the crop yields the following years are dramatically reduced to a small fraction of prior yields and Growers must plow and replant the field in order for them to remain economically viable. Pet. at A12-14.

**The Resource Conservation and Recovery Act and Petitioner's Citizen Suit Action**

In 1976, Congress enacted RCRA "to promote the protection of health and the environment" and to eliminate "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." 42 U.S.C. § 6902(a); H.R. Rep. No 94-1491 at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6241. RCRA applies *only* to materials that meet the statutory definition of "solid waste."[4] The term "solid waste" was specifically defined by Congress as "any garbage, refuse, sludge . . . and other *discarded* material . . . resulting from industrial, commercial, mining, and agricultural operations. . . ." 42 U.S.C. § 6903(27) (emphasis added).

As the statutory language makes clear, Congress did not intend that RCRA govern all materials. Rather, it clearly and unambiguously intended that its application be limited to governing materials that are *discarded* and are no longer wanted by the generator. *See American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) ("*AMC I*"); *American*

3. The process of field burning is also environmentally beneficial, adding badly needed topsoil to the fields and enhancing water quality because the fields are neither plowed nor is the soil disturbed.

4. Hazardous waste is a subset of "solid waste." Stated differently, if a substance is not a solid waste, it cannot be a hazardous waste.

*Petroleum Institute v. EPA*, 906 F.2d 729, 732 (D.C. Cir. 1990); *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ("*AMC II*"); *Association of Battery Recyclers, Inc., v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000). Congress specifically declared that "agricultural products that could be recycled or reused as fertilizers were *not* its concern," inasmuch as it is "not a part of the discarded materials disposal problem" RCRA was designed to address. *See* Pet. at A17 (emphasis in original).

Petitioner brought this action under RCRA's citizen suit provision. 42 U.S.C. § 6972. To prevail in a RCRA citizen suit action, a plaintiff must prove,

> (1) that the defendant is a person . . . who was or is a generator or transporter of *solid or hazardous waste*. . . ; (2) that the defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of *solid or hazardous* waste; and (3) that the *solid of hazardous* waste may present an imminent and substantial endangerment to health or the environment.

*See Interfaith Community Org. v. Honeywell, Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir. 2005). Any threat of imminent and substantial endangerment to health or the environment must be caused by "solid waste" as that term is defined in RCRA. *See* Pet. at A8. Absent proof that a defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of a *solid waste*, a plaintiff cannot prevail under RCRA's citizen suit provision.[5]

5. Although Petitioner argued that the evidence demonstrated that the Growers' burning activities caused substantial endangerment to health and the environmental, the District Court disagreed. It noted that Growers' activities did not cause a violation of the EPA's air quality standards and that "the evidence failed to establish any link to any specific farm." Pet. at A43 n.7. Since the filing of the complaint, three burn seasons have taken place. Neither the EPA nor Idaho's Department of Environmental Quality have taken any action to restrict or curtail this lawful practice. Moreover, despite the filing of a class action personal injury lawsuit in Idaho state court and repeated attempts by those plaintiffs to obtain injunctive relief, no validly issued injunction has been issued and the Growers have continued to burn each summer in accordance with Idaho law.

## The Evidence Presented During District Court Proceedings

Much of the testimony and other evidence presented below concerned the practice of agricultural field burning. Several witnesses testified that burning provided fertilizer for the next year's crop by returning phosphorus and potassium to the soil. *See* Pet. at A13. Other witnesses testified that burning substantially increased the productive life of a bluegrass field. *Id.*

Petitioner presented no evidence that contradicted the Growers' testimony that the burning of Kentucky bluegrass straw and stubble is a critical part of the growing process in north Idaho. Indeed, one of Petitioner's witnesses, Donald Jacklin, a former bluegrass grower who utilized burning, testified that "nothing beats burning" for increased yields of bluegrass seeds, longevity of the fields, and reducing the need to use pesticides, herbicides or fungicides. *Id.* Mr. Jacklin also noted burning maximizes the photo-induction potential and that farmers are unable to use close cropping machines due to the extremely rocky soil conditions. *Id.*

The Growers also submitted evidence in support of the undisputed fact bluegrass straw and stubble are important to the continuous process of producing Kentucky Bluegrass seed. *See* Pet. at A13-15. The Growers also submitted evidence that they used and did not dispose of the stubble and straw. *Id.* Instead, the Growers used these materials in the seed production process as part of the only effective method available in north Idaho to achieve and maintain economically viable yields, to expose the plant crown to sunlight, air and moisture, to reduce parasitic bug infestation; to reduce the growth of fungi, to reduce weed growth, to reduce the rodent population, and to condition the soil. *Id.* Finally, the Growers' testimony was consistent with the findings of the Idaho legislature that "the current knowledge and technology support the practice of burning crop residue to control disease, weeds, pests, and to enhance crop rotations." Idaho Code § 22-4801.

## 2. The District Court Dismisses the Complaint

The District Court conducted a thorough analysis of the evidence presented and concluded that agricultural field burning did not fall within RCRA's definition of "solid waste." The District Court, "viewing the definitions of 'solid waste' and 'disposal' in the context of the entire statutory scheme of RCRA," held that burning of bluegrass stubble and straw was "not meant to fall within the definitions of 'disposal' or 'solid waste.'" Pet. at A37-38. Judge Lodge concluded that RCRA was inapplicable because the Growers did not discard or abandon the bluegrass stubble and straw, "but instead, used [it] as part of the growth process." *Id.* at A39. The District Court's opinion was premised upon its determination that a material must be discarded before it is deemed to be a "solid waste." *Id.*

The Petitioner failed to present even a scintilla of evidence to contradicts the Growers' evidence that they used their bluegrass straw and stubble as part of the growing process. Likewise, Petitioner put forth no evidence that the Growers abandoned or discarded this material. The undisputed testimony conclusively established that the Growers uniformly intended to utilize the straw and stubble and not to discard it.[6] The District Court concluded that because the Growers used the stubble and straw as part of the growth process, and did discard or abandon it, the bluegrass stubble and straw was not a solid waste and RCRA did not apply. Pet. at A39. The District Court also found that the particulate matter generated by the burning of Kentucky bluegrass straw and stubble invoked concerns under the Clean

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6. The District Court found that

> there was no disagreement that burning the residue serves legitimate purposes beyond mere removal of the residue and, therefore, the residue is extremely valuable to the farmers. Thus, the burning of the residue is not an abandonment or discarding of the material but, instead, an important part of the growth process.

Pet. at A38-39.

Air Act, not RCRA, noting that the burning in this case was not what Congress intended to be regulated by RCRA.[7] *Id.* at A43. The District Court also commented that even if the burning was considered a "disposal," the complaint:

> does not seek a remedy as to the act of burning itself. Instead, Plaintiffs seek relief from the smoke created from the burning. This type of relief, by its very nature, invokes concerns under the Clean Air Act (hereinafter "CAA") which was promulgated specifically to address air quality concerns. *See* 42 U.S.C. § 7400 et seq. RCRA, on the other hand, was established to remedy the problems surrounding the increasing amounts of solid waste by regulating methods for disposal of the waste.

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7. The District Court stated,

> RCRA by its very nature is designed to address areas that are more site specific (i.e. landfills and waste disposal facilities) where the CAA is designed to address air quality in a broader sense, which is what Plaintiffs seek to remedy in this case. To allow citizens suits every time someone disagrees with the air environment would be chaotic, unmanageable, and unduly burdensome of the court system.

Pet. at A43-44. The District Court further noted

> Congress has established methods of enforcement for the protection of the public health both in RCRA and the CAA. The remedy sought by the Plaintiffs, however, is more appropriately sought under the provisions of the CAA and/or may very well require a change in policy by the legislative branch of government. *See* 42 U.S.C. § 7470. . . . The evidence here clearly established that the national ambient air quality standard have not been violated by the burning of grass residue in previous years and so Plaintiffs may be unable to bring a suit under the CAA and, it appears, the EPA has not acted arbitrarily in declining to do so.

*Id.* at A42-43.

*Id.* at A38. In sum, the District Court correctly concluded that the burning of the bluegrass straw and stubble was an integral part of the process of grass seed production and is not discarded.

**The Ninth Circuit Affirms the District Court's Judgment, Concluding That RCRA Is Inapplicable As Kentucky Bluegrass Straw and Stubble are Not Solid Wastes**

The Ninth Circuit affirmed the District Court's judgment, concluding that Petitioner failed to establish a genuine issue of material fact regarding whether Kentucky bluegrass stubble and straw is a "solid waste" under RCRA. Pet. at A2. In reaching this conclusion, the Ninth Circuit reviewed RCRA and its statutory definition of "solid waste," various Circuit Court opinions interpreting the definition of "solid waste" and RCRA's legislative history. *Id.*, at A8.

As this Court has often observed, "the starting point in every case involving statutory construction is 'the language employed by Congress.'" *CBS v. FCC*, 453 U.S. 367, 377 (1981), (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). Federal courts are required to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 149 (1984) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

The Ninth Circuit relied upon RCRA's unambiguous statutory definition of "solid waste" and focused its attention on whether the Growers' bluegrass straw and stubble were *discarded materials.* Pet. at A9. The Ninth Circuit looked to the dictionary definition of the verb "discard" and to the *undisputed evidence* that the Growers use the stubble and straw in a continuous process of growing Kentucky bluegrass. The Ninth Circuit held that because the Growers use and therefore do not abandon or discard the stubble and straw, it is not a solid waste. Pet. at A15. The Ninth Circuit's opinion is discussed in more detail, *infra.*

## REASONS FOR DENYING THE PETITION

The Petition should be denied because Petitioner has failed to establish that any compelling reason for the issuance of a Writ of Certiorari exists. Despite Petitioner's predictions to the contrary, the Ninth Circuit's opinion addresses the narrow issue of whether, based upon the *undisputed* evidence presented, the Growers' Kentucky bluegrass stubble and straw is a solid waste under RCRA. The opinion of the Ninth Circuit, the first appellate court to address the obscure claim that the burning of Kentucky bluegrass presents an imminent and substantial danger to public health and the environmental, does not conflict with any decision issued by this Court or any of the circuit courts. Moreover, the Ninth Circuit did not depart from the accepted and usual course of judicial proceedings nor did it sanction such a departure by the District Court. Finally, given the undisputed evidence presented that the Growers use and do not abandon or discard the stubble or straw, no erroneous factual findings exist.

The Petition takes issue with a narrow opinion of the Ninth Circuit which sets no new standards nor has wide applicability. Petitioner argues that the Ninth Circuit's reasoning is contrary to the plain meaning of RCRA's statutory language, that its opinion lies in direct conflict with the opinions of no fewer than five other circuit courts of appeals, and that a broad loophole has been created which will allow circumvention of RCRA's protections.[8] Petitioner also claims that the Growers' burning activities provide only "incidental benefits" and that the Ninth Circuit should have conducted an analysis of the Growers' "handling" of the straw and stubble.

Petitioner's arguments ignore that no circuit conflict exists. Also, it fails to recognize that the District and Circuit courts

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8. While Petitioner contends that a broad loophole in RCRA enforcement has been created, they fail to point to even a single example of any contributors to the nation's solid or hazardous waste problem who have avoided any regulatory oversight by EPA based upon the Ninth Circuit's opinion.

conducted the critical analysis required in any action brought under RCRA's citizen suit provision and properly concluded, based upon *uncontroverted* evidence, that the Growers use the straw and stubble as a continuous part of the growth process. *See* Pet. at A18, A39 Both courts properly concluded that the stubble and straw were therefore not "solid wastes" regulated under RCRA. *Id.*

Petitioner's assertions that the Growers merely derive "incidental benefits" from the burning of the stubble and straw ignore the clear findings of the Ninth Circuit based upon the *undisputed evidence*. Pet. at A15. Finally, the Petition is little more than a request to review the Ninth Circuit's comment, in a *footnote*, it did not need to determine whether the Growers' burning activities constituted a "handling" of those materials under RCRA because it had already determined that the stubble and straw were not "solid wastes." Pet. at A19 n.15.

The Ninth Circuit noted that its opinion was strictly limited to the application of the existing RCRA jurisprudence to the *undisputed* evidence presented. "We only hold that, *in these circumstances of Kentucky bluegrass farming, grass residue customarily used in the farming cycle is not 'solid waste' under RCRA*." *Id.* at A19 n.14 (emphasis added). Petitioner's arguments are a thinly veiled attack on factual findings based upon the *uncontroverted* evidence presented below. In sum, the Petition raises issues which have little likelihood of being applicable to any action which could arguably arise in the future under RCRA, does not present a circuit conflict, and does not warrant the issuance of a Writ of Certiorari.

## I. The Ninth Circuit's Opinion Is Based Upon and Is Entirely Consistent With RCRA's Statutory Definition of "Solid Waste"

The cornerstone of the Ninth Circuit opinion was its correct conclusion that the stubble is not a "solid waste." Under RCRA, "solid waste" is defined as any garbage, refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air

pollution control facility and other *discarded material*. 42 U.S.C. § 6903(27) (emphasis added). The Ninth Circuit relied upon RCRA's unambiguous statutory definition of "solid waste." Pet. at A9. It focused its attention on *discarded material* and looked to the dictionary definition of the verb "discard." The Shorter New Oxford English Dictionary defines "discard" as "to cast aside, reject, abandon, give up." *Id.* (citing 1 The Shorter New Oxford English Dictionary 684 (4th ed. 1993).[9] The Ninth Circuit also relied upon the opinions of the D.C. Circuit, which has repeatedly held that RCRA is an unambiguous statute that need not and should not rewritten by this or any other court. *See AMC I*, 824 F.2d at 1186 n.11 (rejecting EPA's argument that a narrow reading of "discarded" would "vitiate" RCRA's remedial purpose); *see also Battery Recyclers*, 208 F.3d at 1056 (RCRA's statutory language was unambiguous and did not present the exceptional circumstances warranting resort to its legislative history).[10]

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9. Opinions interpreting CERCLA also provide helpful guidance, as the statutory definition of disposal in that statute is no difference from the one found in RCRA. *See* 42 U.S.C. § 9601(29). The Ninth Circuit stated that "[p]roperty is abandoned when the owner intends to divest himself of all interest in it" *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir. 1998). *See also 3550 Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355, 1362 (9th Cir. 1990) ('disposal' refers only to the affirmative act of discarding a substance as waste, and not to the productive use of the substance).

10. "[A] liberal construction does not mean one that flies in the face of the structure of the statute." *U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995). Various Circuits Courts of Appeal have applied these same principles of statutory construction even when the statutes are remedial if the statute were unambiguous. In *AIC*, the Seventh Circuit recognized that the "employment discrimination statutes have broad remedial purposes and should be interpreted liberally, but that cannot trump the narrow focus conclusion we draw from the structure and logic of the statutes." *Id.* (holding that individuals who do not otherwise meet

(Cont'd)

The Ninth Circuit, after applying the statutory definition of "solid waste" to the "*undisputed* evidence that the Growers reuse the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass," concluded that no genuine issue of material fact existed as to whether grass residue is "discarded material." *Id.* at A15 (emphasis added). The Ninth Circuit, based upon the voluminous record, properly found that the evidence supported the determination that the stubble "is not discarded, abandoned, or given up." Based upon these well-grounded determinations of fact and its statutory definition, the Ninth Circuit concluded that bluegrass stubble and straw therefore "does not qualify as 'solid waste' under RCRA." *Id.*

The Ninth Circuit's opinion is consistent with Congressional intent in enacting RCRA. Congress made clear that its focus was with materials that were truly wastes and not materials that were not discarded.

> Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses. . . . Agricultural wastes that are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.

H.R. Rep No. 94-1491, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N., 6239.

It is also well settled under RCRA that materials that are reused in an *ongoing* manufacturing or industrial process are not solid wastes. *See AMC I*, 824 F.2d at 1186. The D.C. Circuit

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(Cont'd)
the statutory definition of employer cannot be held liable under the ADA). *See also Butler v. City of Prairie Village, Kansas*, 172 F.3d 736, 744 (10th Cir. 1999) ("while the ADA's remedial purposes are broad and far-reaching, the statute imposes liability only on a specifically defined class of persons").

in *AMC I* held such materials were not solid wastes, because they "have not yet become part of the waste disposal problem; rather, *they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.*" *Id.* (emphasis in original). Because such materials were never "disposed of, abandoned, or thrown away," the court concluded, they were not "discarded" within the meaning of RCRA. *Id.* at 1193.

The Ninth Circuit correctly followed the reasoning of the D.C. Circuit in *AMC I* in holding that Congress clearly intended to grant EPA's authority under RCRA "*only* to materials that are truly discarded, disposed of, thrown away, or abandoned." *Id.* at 1190 (emphasis added). In concluding that the bluegrass stubble and straw were always retained and used by the Growers as part of the growth process and were therefore not discarded materials, the Ninth Circuit reasoned that "encompassing materials retained for immediate reuse within the scope of 'discarded material' strains, to say the least, the everyday usage of that term. Pet. at A10 (citing *American Mining Congress v. E.P.A.*, 907 F.2d 1179, 1184 (D.C. Cir. 1990)).

Petitioner ignores that it failed to demonstrate a genuine issue of material fact that the stubble and straw were solid wastes under RCRA and contorts the Ninth Circuit's holding in an attempt to support its argument that "solid waste" "cannot extend to secondary materials . . . so long as such recycling provides some economic 'benefits' to the recycler."[11] Pet. at 25. Although Petitioner acknowledges that the "statutory touchstone" for determining whether a substance is solid waste turns on whether such material is discarded, rather than focus on whether or not

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11. Although Petitioner claims that this was the Ninth Circuit's central holding, review of its opinion leads to the clear conclusion that it was not.

the Growers discarded their post-harvest Kentucky bluegrass straw and stubble, as the Ninth Circuit correctly did, it appears to argue that virtually all materials generated by agricultural (and other) producers constitutes "secondary material."

Petitioner's argument consists of three unsupportable elements. In the first, Petitioner mischaracterizes bluegrass straw and stubble as "secondary materials."[12] In the second, Petitioner argues that the burning of the stubble and straw produces only "incidental benefits" to the Growers. In its third element, Petitioner attempts to broaden EPA's regulations related to hazardous waste to cover straw and stubble.

Petitioner's arguments are incorrect, ignore the *undisputed* findings made below and attempt to elevate irrelevant issues. First, although Petitioner repeatedly describes the straw and stubble as "secondary," neither the EPA nor the District or Circuit court has used that term. Petitioner, without any basis, attempts to diminish the importance of the stubble and straw. To the contrary, given the Growers' active use of those materials as part of the growth process, they are critical thereto. Petitioner characterizes the bluegrass straw and stubble as providing merely "incidental benefits" to the growing of Kentucky bluegrass and assert, without any basis, that the benefits of the burning of the stubble and straw are incident to the Growers' goal of removing the residue. Pet. at 11. Petitioner's assertions are contrary to the undisputed evidence presented which clearly established that the Growers obtain far more than incidental benefits. Pet. at A15. They are also tantamount to an improper request to judicially fashion a hierarchical system which substitutes

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12. Petitioner broadly defines "secondary material" as "any material generated by 'industrial, commercial, mining and agricultural' materials." Pet. at 4. Under Petitioner's definition, secondary material includes all agricultural products, including the bluegrass seeds that are harvested, gathered and sold by the Growers. Congress clearly did not intend to regulate products destined for commercial sale in enacting RCRA.

RCRA's clear requirements with an analysis which compares the benefits of a particular practice (e.g. burning) with other alleged goals (e.g. removal).

Petitioner ignores that the judicial analysis of whether a material is discarded is fact-specific and highly dependent on evidence regarding the owner's intent. This case, like all other RCRA actions, involved an initial determination regarding whether the material in question is a solid waste. That analysis necessarily involves a thorough examination of the evidence presented, with a particular focus on the testimony presented by the owner of the materials about his intent regarding how those materials are used in the production process and whether or not the owner intends to relinquish or cast them aside. Accordingly, opinions based upon factual determinations in one RCRA action are rarely applicable to another, unless they involve the same material.

Petitioner ignores that the Ninth Circuit determined that the Growers derive critical "farming benefits" from the burning of the straw and stubble. *Id.* Petitioner simply cannot overcome the Ninth Circuit's core conclusion that the *uncontroverted evidence* supported the determination that they were not discarded and therefore not solid wastes.[13] Petitioner admits that the nitrogen that is created following the burning of the straw and stubble and is returned to the soil "would not be considered 'solid waste' because they are not being 'discarded.'"[14] Pet. at 17. Finally, Petitioner ignores that the testimony of its own witnesses supported the Growers' claims regarding the

13. After finding that Petitioner did not contradict the evidence presented by the Growers that stubble and straw is beneficial to the growing of Kentucky Bluegrass, the Ninth Circuit noted that "[i]t is not enough for Safe Air merely to argue that the uncontested benefits are ancillary." Pet. at A19, n.14.

14. Petitioner fails to explain how some alleged recycled materials resulting from a continuous manufacturing process are excluded from the regulatory definition of solid waste (e.g. nitrogen returned to the soils as fertilizer) while others are not.

importance and benefits of burning to the growing of Kentucky bluegrass in north Idaho. *Id.* at A13.

In sum, Petitioner's arguments regarding the statutory and regulatory definitions of solid waste, in essence, ask this Court to determine whether or not Kentucky bluegrass straw or stubble is a solid waste through a new test which substitutes clear Congressional intent, as set forth in the RCRA's statutory language, with an admittedly irrelevant regulatory definition. This Court should decline this invitation inasmuch as RCRA's legislative history firmly supports the Ninth Circuit's conclusion that "the burning of bluegrass residue in not the evil against which Congress took aim" in enacting RCRA. Pet. at A17. Respondents respectfully submit that this Court should reject Petitioner's argument.

## II. The Ninth Circuit's Opinion Is Consistent With The RCRA Jurisprudence of Other Circuit Courts of Appeal and Creates No Conflict Between the Circuits

A. The Ninth Circuit's Opinion is wholly consistent with RCRA's clear statutory language and does not conflict with the decisions of any other Circuit Court of Appeal. While Petitioner asserts that "growing confusion" exists in the courts of appeal regarding the meaning of solid waste as applied to recycled materials under RCRA, review of the cited authorities does not support this contention.[15] Each opinion addresses narrow issues that are specific to the facts of each case and most are also premised upon interpretation of EPA's inapplicable hazardous waste regulations. Despite these factual dissimilarities, the Ninth Circuit's opinion is consistent with any broad principles regarding RCRA "solid wastes" expressed by the various circuits.

The Ninth Circuit evaluated whether the Growers' reuse of their stubble and straw fell within the statutory definition of a

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15. Many of the authorities Petitioner cites in support of its claim that a circuit split exists were also cited by the Ninth Circuit in its opinion.

solid waste and concluded that it did not, finding that the Growers presented:

> undisputed evidence that [they] reuse the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass. . . . The bluegrass is not discarded, abandoned or given up and it does not quality as "solid waste" under RCRA, based upon its statutory definition of "solid waste" as "discarded material.

Pet. at A15.

In support of its holding, the Ninth Circuit cited opinions from the District of Columbia, Eleventh and Second Circuits.[16] *See e.g. AMC I, AMC II, Battery Recyclers* and *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993); *Connecticut Coastal Fishermen's Assn. v. Remington Arms Co., Inc. et al.*, 989 F.2d 1305 (2d Cir. 1993). Petitioner claims that the Ninth Circuit's opinion stands in conflict with the opinions of no less than *five* other circuit courts of appeal, because it concluded that material can be "destroyed without being 'discarded' if it is beneficial to destroy material that would otherwise be harmful." Pet. at 25. Petitioner further argues that the Ninth Circuit erred because these allegedly recycled materials have some "economic 'benefits' to the recycler." *Id.*

These arguments do not accurately reflect the holdings of the Ninth Circuit or any other Circuit Court of Appeal. None of the cases cited by Petitioner involve stubble, straw, or any form of agricultural materials or address non-hazardous materials that were continuously used by the original owner as part of its production process. All of the cases cited by the Petitioner concern hazardous or recycled materials that were discarded by the original consumer or those materials that were deemed

16. Petitioner's citation to the same authorities in support of its claim that a circuit split exists is perplexing. As discussed more fully *infra*, those opinions are all legally consistent with and factually distinguishable from this action.

abandoned based upon the lengthy period that their owners did not use them. In this matter, which did not involved recycled materials or hazardous waste, the undisputed evidence established that the Growers *used* the stubble or straw as part of a continuous growing process and did not discard it.[17]

The Petitioner, like the Ninth Circuit, correctly noted that the District of Columbia Circuit has addressed the definition of solid waste under RCRA more frequently than any other Circuit Court of Appeal. The Ninth Circuit's opinion is consistent with all of the RCRA's decisions issued by the D.C. Circuit, including its opinion in *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003). In *Safe Food*, the D.C. Circuit reaffirmed its earlier holdings in *AMC I* and *Battery Recyclers*, holding that "the term 'discarded' cannot encompass materials that 'are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.' *Id.*, 350 F.3d at 1268.

The authorities cited by Petitioner do not support its claim that a split in the circuits exists. For example, Petitioner's reliance on *Battery Recyclers* is misplaced. In *Battery Recyclers*, the D.C. Circuit addressed a challenge to regulations that defined residual or secondary materials generated in mining and mineral processing operations as "solid waste" and affirmed its holding in *AMC I*. 208 F.3d at 1052. In a unanimous opinion, the D.C. Circuit found that EPA had not properly defined "'solid waste' when it had concluded that 'discarded material' included 'any material which is *Abandoned* . . . or *Recycled*'". *Id.* at 1050.

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17. Petitioner's repeated references to recycled materials constitutes a *de facto* invitation to this Court to review the entirety of the hazardous waste regulations governing recycled materials. However, those regulations are not applicable to the issues raised in the Petition. Although the recycler has found a "treasure" in another man's "trash," to be recycled, they must first have been disposed of. In this case, the Growers, at all times, value and retain their straw and stubble and maintain it within their exclusive possession for continuous use as part of the growing process. Accordingly, it does not fall under the statutory (or regulatory) definition of solid waste.

> [Petitioners] ask how secondary material held for recycling in production could possibly qualify as "waste" when the statute defines "waste" as "discarded materials" 42 U.S.C. § 6903(27).

*Id.* at 1051.

The D.C. Circuit, noting that the question was not a new one, rejected EPA's attempts to limit *AMC I* to "immediate reuse." *Id.* at 1052-53. It also rejected EPA's arguments that *API* and *AMC II* extended RCRA's reach to materials that were not discarded. The Court of Appeals succinct conclusion is likewise applicable to this matter:

> [A]t least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away. Once again, "by regulating in-process secondary materials, EPA has acted in contravention of Congress' intent," 824 F.2d at 1193, because it has based its regulation on an improper interpretation of "discarded" and an incorrect reading of our *AMC I* decision.

*Id.* at 1056. Accordingly, to be regulated under RCRA, a material must be discarded by the generator before RCRA applies.

Petitioner's reliance upon *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993), for the proposition that recycled materials constitute solid wastes regulated under RCRA is incorrect because ILCO is factually distinguishable from this matter. The defendant in ILCO was a lead smelter that *purchased* spent car batteries *for recycling purposes*. While the Eleventh Circuit, in *ILCO*, concluded that reclaimed lead parts from vehicle batteries were not exempt from regulation under RCRA, that determination turned on

the fact that the materials were discarded by the original consumer and reclaimed by the defendant. The Eleventh Circuit stated that that "*[p]reviously discarded* solid waste, although it may at some point be recycled, nonetheless remains solid waste." *Id.* at 1132 (emphasis added).

In the present case, the Growers, at all times, were the original owners and retained exclusive ownership and control over the bluegrass stubble and straw at issue in this matter. The ILCO court's finding that "[s]*omebody* has discarded the battery" was central to its conclusion that EPA has authority to regulate those materials which were discarded prior to ILCO's purchase. EPA's authority to regulate those materials is clear, as the batteries were already a part of the nation's waste problem that RCRA was designed to address. Second, EPA sought to regulate the lead and cadmium, which exhibit toxicity characteristics that render them hazardous pursuant to 40 C.F.R. § 261.2, its *hazardous waste regulations.*[18] As discussed *infra*, those regulations are inapplicable to bluegrass stubble and straw, neither of which is hazardous.

The stubble and straw in question are materials retained for immediate reuse "in a continuous stream or flow from one production process to another." *AMC I*, 824 F.2d at 1190. "Previously discarded solid waste, although it may be recycled at some point, remains solid waste." *ILCO*, at 996 F.2d at 1132. To the contrary, materials which are never

18. Although EPA has promulgated regulations under RCRA which list specific hazardous *wastes* by listing and by characteristics, it cannot regulate any materials under RCRA unless they are solid wastes. For example, lead batteries, while in the possession of the original consumer and during its useful life, are not solid wastes under RCRA, notwithstanding their toxic characteristics. However, once a spent car battery loses its utility and is left by its undoubtedly unhappy owner with a mechanic or by the roadside, it has been discarded or abandoned and only then constitutes a hazardous solid waste regulated under RCRA.

discarded, but used as part of a continuous process, are not. Pet. at A18. Thus, the Ninth Circuit's opinion that the Growers' bluegrass straw and stubble is neither discarded nor recycled is entirely consistent with *ILCO*.

Petitioner also relies upon *Connecticut Coastal* in support of its claims that a split exists among the circuits. Pet. at 19, 21. In *Connecticut Coastal*, the owners of a trap and skeet club were deemed to have "discarded" the lead shot and clay targets which were, at one time, used by its members. 989 F.2d at 1308. The Second Circuit noted that the shot and targets, after serving their intended purposes, had been left to accumulate in Long Island Sound as much as *70 years*. *Id.* While the Second Circuit did not determine how long materials must accumulate before they become discarded, the Growers in present case burn the straw and stubble days or weeks after the seeds are harvested as part of a continuous process of growing bluegrass.[19] *Id.* at 1316. While the facts of *Connecticut Coastal* are readily distinguishable from this action, the Second Circuit's holding is consistent with that of the Ninth Circuit's opinion in this matter. No comparison can be made between discarded lead shot that was abandoned for decades with stubble and straw that is continuously used by the Growers.

Despite Petitioner's' claim to the contrary, the Ninth Circuit's decision is consistent with **all** of the opinions issued by other circuits. The Ninth Circuit's opinion, which was premised upon the *undisputed* findings that the Growers did not discard or abandon their straw and stubble, is also

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19. Under circumstances entirely different from this action, other materials clearly are discarded. *See Owen Electric Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994) (slag generated as a byproduct of steel production which remained untouched for six months or more before it was *sold* to other entities was held to be "discarded" when it had was not destined for beneficial reuse or recycling a continuous process by generating industry itself).

factually distinguishable from those cases. The Growers' use of the straw and stubble is entirely distinct from the (1) hazardous petroleum products at issue in *Am. Petroleum Inst. v. EPA*[20], 906 F.2d 729 (D.C. Cir. 1990), which were held to be "indisputably 'discarded' *before* being subject to metals reclamation" by another industry, (2) the previously discarded batteries in *Assn of Battery Recyclers*, (3) the lead shot and clay targets left in Long Island abandoned for decades after serving "their intended purpose " in *Connecticut Coastal*, and (4) the slag which sat for six months before being sold to another entity in *Owen Elect.*

The bluegrass stubble and straw, like the fertilizer in *Safe Food*, is used by the Growers for their intended purposes and are neither abandoned nor discarded nor destined for recycling or reclamation in another industry. *See No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148 (2[d] Cir. 2001) (City did not "discard" insecticides when it sprayed them into air with design of effecting their intended purpose of reaching and killing mosquitoes and their larvae). Instead, the straw and straw is used by the Growers as part of a continuous process of the growing of Kentucky bluegrass and is never discarded. "Material is not discarded until after it has served its intended purpose. *Id.* at 149. Accordingly, none of the authorities cited by Petitioner's supports its assertion that the Ninth's Circuit's opinion creates a conflict among the various circuits.

As no circuit conflict exist, the Petition should be denied.

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20. In *Am. Petroleum*, the Court of Appeals reaffirmed *AMC I* and vacated portions of an EPA regulation that determined that oil-bearing wastewaters were solid waste for purposes of RCRA. The Court held that "[l]egal abandonment of property is premised on determining the intent to abandon, which requires an inquiry into facts and circumstances." *Id.* at 57. The intent of the generator is thus critical.

## III. The Ninth Circuit's Opinion Has Created No Loophole in Enforcement of RCRA's Hazardous Waste Regulations

### A. EPA's Hazardous Waste Regulatory Definition of Solid Waste Is Inapplicable to This Matter Because Neither Stubble Nor Straw Is Hazardous.

Petitioner asks this Court to apply the highly specific definitions set forth in RCRA's *hazardous waste* regulations into a matter governed under the more general scheme set forth in RCRA itself. Petitioner argues that a broad loophole in RCRA enforcement has been created by the Ninth Circuit's opinion. Both arguments are meritless as RCRA's hazardous waste regulations are inapplicable to this action and because the Ninth Circuit's opinion is a narrow one which is expressly limited to the facts presented.

EPA's hazardous waste regulations have "extremely technical and precise distinctions," and are admittedly inapplicable to this case. Pet. at 6.[21] EPA's regulatory authority under RCRA Subtitle C extends only to the regulation of hazardous waste, which is defined as a subset of solid waste. Under subtitle C, "the scope of EPA's jurisdiction is limited to those materials that constitute 'solid waste.'" *AMC I*, 824 F.2d at 1179 (citation omitted). Because the Growers' straw and stubble fall outside of the definition of solid waste, RCRA's hazardous waste regulations are entirely irrelevant to this matter and all of Petitioner's arguments and inferences should be disregarded.[22]

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21. Petitioner admits that EPA's recycling regulations exist "only for the purposes of administration of RCRA's hazardous waste program." Pet. at 5.

22. Petitioner asks this Court to look to EPA's hazardous waste regulations for guidance, despite the undeniable inapplicability of those regulations. Title 40, Part 261 of the Code of Federal Regulations, is (Cont'd)

Petitioner ignores that the Ninth Circuit's determination that the straw and stubble were not solid wastes was central to its analysis. The Ninth Circuit concluded, based upon the undisputed evidence and the unambiguous statutory definition of "solid waste," that the Growers' bluegrass straw or stubble was used as part of a continuous process of the production of Kentucky bluegrass and was therefore outside of RCRA's purview. It did not rely upon any definitions set forth in EPA's hazardous waste regulations.

Petitioner relies upon RCRA's hazardous waste regulations to support its contention that the Ninth Circuit was incorrect in concluding that the burning of the Growers' bluegrass straw and stubble did not constitute disposal of a solid waste. Petitioner's arguments miss the mark as neither the District Court nor the Ninth Circuit relied upon RCRA's regulatory definitions. By asking this Court to ignore RCRA' unambiguous statutory definition of solid waste and substitute it with an admittedly inapplicable regulatory one, Petitioner seeks to substitute the explicit intent of Congress and relevant case law with definitional information contained in irrelevant regulations. Petitioner's request should not be granted.

Petitioner attempts to overcome the flaw in its arguments by making general references to RCRA's overriding purpose

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(Cont'd)

entitled "Identification and Listing of *Hazardous Waste*" (emphasis added), and is by definition, inapplicable to both non-hazardous solid waste and therefore to this action.

> The definition of solid waste contained in this part applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA. For example, it does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled.

40 C.F.R. § 261.1(b)(1).

of protection of human health and the environment; however, this approach ignores two independent but critical points. First, Petitioner ignores that public health protection references in RCRA are general in nature and do not impose specific duties on individuals. To the contrary, RCRA's statutory definition of solid waste is clear and strictly controls judicial interpretations thereof. *See Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988). While Petitioner appears to claim that a conflict exists between the specific statutory definition of solid waste and RCRA's general goal of protection of public health, a review of the text of RCRA leads to the inescapable conclusion that no such conflict exists. *See Gallenstein v. United States*, 975 F.2d 286, 290 (6th Cir. 1992) (the general rule that the specific governs the general "does not apply when the plain language of the two subsections can be reconciled without need for the application of a general rule."). Even if a conflict does exist, the specific statutory definition of solid waste would control over the general goal of public health protection. *Id.* Petitioner also ignores that neither the District Court nor the Ninth Circuit concluded that the burning of bluegrass straw or stubble presents a danger to health or the environment.

Congress specifically declared that "agricultural products that could be recycled or reused as fertilizers were *not* its concern," because it is "not a part of the discarded materials disposal problem" RCRA was designed to address. Pet. at A17. The Ninth Circuit concluded that the Growers' stubble and straw was "not the type of material Congress intended to proscribe under RCRA." Pet. at A16

Petitioner ignores the fact that EPA has never found that the Growers have violated RCRA. The reasons for such administrative conclusions are clear. First, the practice of field stubble burning is not new; rather, it is a long-standing agricultural practice utilized by farmers in virtually every state. Second, field burning is and has been strictly regulated

in north Idaho by the Idaho Department of Agriculture (ISDA) and the Idaho Department of Environmental Quality (IDEQ) pursuant to the Idaho State Implemental Plan (SIP) promulgated under the Clean Air Act and the Idaho Smoke Management Act. Idaho Code § 22-4801 *et seq.*

Petitioner's argument that the Growers' use Kentucky bluegrass stubble and straw "in a matter constituting disposal" is unsupported by the record and is entirely dependent upon application of the inapplicable regulatory definition of "disposal" set forth in EPA's hazardous waste regulations. Petitioner also ignores the factual findings made below which demonstrate that the Growers' burning of bluegrass stubble and straw are an integral part of the process of growing bluegrass in north Idaho. Pet. at A39. Petitioner ignores the testimony of its own witnesses, which supported the lower court's findings that the straw and stubble did not constitute a solid waste. For example, Petitioner's star witness, former grower Don Jacklin, admitted that the value of burning to the production, panting and harvesting of Kentucky bluegrass in North Idaho was irreplaceable. *Id.* at A13. Paul Meints, one of Petitioner's experts, admitted that open burning of the stubble and straw acts as a fertilizer and restored nutrients to the fields. *Id.* at A13-14.

Petitioner cites to 40 C.F.R. § 261.2(c) in support of its claim that the Growers recycle the bluegrass straw and stubble simply burning it. No support exists for the claim that the straw and stubble are being recycled. To the contrary, the entirety of the evidence demonstrated that the stubble and straw are used as part of a "continuous process of growing bluegrass," that the Growers did not discard it and that burning was required given the atmospheric conditions, elevation and the poor, rocky soils in north Idaho. Pet. at A12. Petitioner's arguments also fail even when applying the regulatory definitions set forth in 40 C.F.R. § 261.2(e)(i), inasmuch as the District Court and the Ninth Circuit correctly

concluded, based upon undisputed evidence, that the Growers used the stubble and straw. The record is entirely devoid of any allegations or evidence that the Growers recycled it. Accordingly, even assuming *arguendo* that RCRA's hazardous waste regulations were applicable to the burning of Kentucky bluegrass straw and stubble, Petitioner's argument fails inasmuch as the stubble and straw is excluded from the regulatory definition of solid waste.

Finally, Petitioner's relies upon inappropriate regulatory definitions applicable to recycled hazardous wastes that are placed onto land. This argument is equally meritless because neither the stubble nor straw nor the smoke that results from its burning is recycled or constitute waste. "The burning of bluegrass residue by farmers is not the evil against which Congress took aim" in enacting RCRA. Pet. at A17.

In sum, the Petition fails to present any compelling reason why this Court should grant a Writ of Certiorari. Petitioner relies upon regulations that are inapplicable to the materials at issue in this matter. The District Court and the Ninth Circuit properly rejected Petitioner's arguments after concluding that the entirely of the evidence established that the Growers used their stubble and straw and did not discard or abandon it.

### B. The Ninth Circuit's Opinion Creates No Loophole In Regulating Hazardous Wastes

Petitioner contends that the Ninth Circuit's opinion creates a loophole that will prevent EPA from enforcing RCRA's *hazardous waste* regulations. Although Petitioner devotes much of the Petition to this argument, it is unsupported and its concerns are entirely unfounded. First, the Ninth Circuit opinion is extremely narrow and is based upon its holding that "in these circumstances of Kentucky bluegrass farming, grass residue customarily used in the farming cycle is not 'solid waste' under RCRA." Pet. at A19

n.14. The Ninth Circuit's opinion is entirely consistent with the opinions of its sister circuits and given the narrow set of facts upon which it is based, it is highly unlikely that it can be construed broadly.

Second, the Ninth Circuit's opinion did not refer to or address EPA's hazardous waste regulations and nothing in the opinion is applicable to the hazardous waste regulatory scheme. Moreover, to be regulated under RCRA, users of hazardous materials, like users of non-hazardous materials, must have discarded those materials. Absent discard, those materials are simply not yet and may never be part of the nation's "waste disposal problem" Congress sought to cure in enacting RCRA.

Third, Petitioner's argument that entities "engaged in classic waste disposal activities" will use the shelter provided by the Ninth Circuit's opinion to avoid "any RCRA regulation" is highly speculative, has not resulted in a wave of unregulated waste disposal activities to surge across the land, and is not remotely likely to occur in the future. Petitioner has failed to identify a single instance where an entity otherwise subject to RCRA's hazardous waste regulations has even argued that the Ninth Circuit's opinion effectively deprives EPA of the power to enforce its hazardous waste regulations.

Hazardous materials that are used by its original owner will continue to be materials which are not "solid wastes" and therefore not governed by RCRA. Materials that are discarded, irrespective of whether they are hazardous or recycled by another industry, will continue to be deemed solid wastes and remain subject to RCRA's dictates. The Ninth Circuit's opinion does not depart from established RCRA jurisprudence governing solid *or* hazardous wastes.

## CONCLUSION

Petitioner failed to establish any compelling basis for the Court to issue a Writ of Certiorari in this matter. The Ninth Circuit's reasoning is consistent with all decisions and authorities interpreting the meaning of solid waste under RCRA. There is no conflict among the various circuits on any issue raised in this matter. Additionally, no element of the Ninth Circuit's opinion will interfere with EPA's ability to enforce its regulations regarding hazardous waste because the materials at issue, Kentucky bluegrass straw and stubble, do not qualify as either solid or hazardous waste under RCRA. Petitioner has not and cannot identify even a single instance in which EPA's ability to protect the public's health under RCRA has been compromised (or is likely to be in the future) by the Ninth Circuit's decision. In summary, there is no compelling issue of law or of public policy that supports any rationale under which this Court should issue a Writ of Certiorari. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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